VIRGINIA LAW REGISTER

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Civil and Police Justices in Cities Containing Ten Thousand Inhabitants and Less Than Forty-Five Thousand Inhabitants.

An examination of the Act of February 11th, 1915 (Session Acts 1915, p. 69) makes one wonder what was the exact *raison d'etre* of the measure. It provides for the election of a special justice of the peace, to be known as the civil and police justice in cities containing ten thousand inhabitants and less than forty-five thousand inhabitants; prescribes his duties, authorizes the issue *by other justices of the peace* in said cities of warrants cognizable by said civil and police justice. It abolishes the office of police justice in said cities and *towns* and transfers the jurisdiction of such justices in said cities and *towns* to such police justices. It will be noted as a decided case of careless legislation that elections are only provided for in "*cities*" and as there is no "*town*" in Virginia of ten thousand inhabitants the use of the word "town seems rather useless.

The rather lengthy act then sets out the qualification, oath, bond, compensation, etc., etc., of said justice; defines his jurisdiction, which is quite extensive and then inserts the following rather remarkable section:

"Sec. 9: Issue of Warrants—A warrant within the jurisdiction conferred by this act upon such civil and police justice may be issued by any justice of the peace of his city, *except said civil and police justice* (italics ours) but when so issued it shall be made returnable only before such civil and police justice for trial and determination."

We have here a civil and police justice who cannot issue a warrant, no matter how urgent the case may be. He is a *trial* justice pure and simple. Can any sensible reason be given for this limitation of his powers?

Section 10 provides "At or before the time of hearing HAS (sic) before such civil and police justice on any claim of which the civil and police justice is given jurisdiction by sub-section two of section eight of this act the plaintiff in such claim shall pay to the said civil and police justice a trial fee of fifty cents for each one hundred dollars of value, or fraction thereof claimed in such warrant. The trial fee shall be taxed as part of the costs. The civil and police justice shall pay monthly into the treasury of his city all trial fees collected by him."

The police justice is paid by a salary fixed by the Council of his city and the wheels of justice in his court are not allowed to clog; for he can draw no installment of salary until he has solemnly certified (to whom it is not provided) that he has disposed of all cases submitted to him for decision more than thirty days previous to the date upon which said installment falls due. Of course the fee for *issuing* the warrant, civil or criminal, goes to the justice issuing the same, but no provision is made for taxing that fee in the costs.

Section twelve allows an appeal, and here again the draughtsman, the committee on enrolled bills or the printer has been caught napping: "There shall be an appeal from the judgment of the *city and police*" (italics ours) "to the corporation or hustings court of his city, as now or hereafter provided by law," etc., etc. Evidently the word "justice" has been omitted in this section after the words "city and police," but even if the courts were to insert it, the sentence would read "city and police justice," and there is no such officer—there being a "*civil* and police" justice. So in order to allow an appeal from the decision of this officer the courts must either change the word "city" to "civil," insert the word "justice" after "police" or strike out entirely the words "from the judgment of the city and police." These words might be treated as superfluous, as the section, with them entirely omitted could be construed to allow an appeal.

But these are not all of the difficulties surrounding this wonderful piece of legislation. Richmond and Norfolk being cities of over forty-five thousand inhabitants are not included in the act by its terms. Alexandria is relegated to the tender mercies of an act approved December 31st, 1903. In June, 1915, when

this act took effect, there were eight cities of over ten thousand and under forty-five thousand inhabitants in this state. They were: Alexandria, Danville, Roanoke, Lynchburg, Portsmouth, Petersburg, Newport News and Staunton. Every one of these cities but Newport News is *expressly exempted* from the terms of this act by the act itself. So here was an act which was passed to provide for civil and police justices in one single city in the state, which was not named in the act itself. Since its passage the venerable City of Charlottesville has emerged from its swaddling clothes and become a city of the first class, i. e. of over ten thousand inhabitants. Its city attorney and council have struggled over the provisions of this act. A justice—other than the "civil and police justice"—issues warrants and the latter official, with his blushing honors thick upon him, duly tries them.

Can any one explain the "whys and wherefores" of such legislation? Or can Newport News waft a signal of hope to Charlottesville?

About Instructions Again.

We have been accused of being a little "daft" on the subject of "Instructions," and we plead "guilty." We have seen so much confusion caused, and so much injustice done by our clumsy method of instructing juries that we never lose an opportunity of calling attention to this antiquated and absurd way of giving the law to the jury. We heartily approve of the somewhat bluff way in which an old judge disposed of some twenty odd instructions in a criminal case in which a venerable Senegambian was on trial for stealing a hog, having broken into an outhouse for that purpose and therefore having a penitentiary sentence staring him in the face. Instructions—as to "reasonable doubt," "any other hypothesis," "what a verdict of not guilty means," "the concurrence of twelve minds," "the presumption of innocence following at every stage," "recent possession," etc., etc., *ad libitum, ad nauseam,* were asked for.

The judge read them to the jury, then looked solemnly over his spectacles and said: "Gentlemen of the jury, all these things I have read to you simply mean, if you are convinced as reasonable men, from the evidence, that this nigger broke in that house

and stole that hog, and all twelve of you think so, then you will find him guilty. If you don't, you won't. The fact that the hog was found in his possession six hours after it was stolen don't prove that he broke into the house; but the fact that it was so found, if you believe it from the evidence, and the further fact, if you believe it to be a fact from the evidence, that he could give no reasonable explanation of how he got the hog are circumstances which authorize you to convict of breaking in the house, if you see fit to do so."

That, in our judgment covered the whole ground. But to return to our muttons. Our Supreme Court is settling this question of instructions as far as they can in the very best way. The *"scintilla"* doctrine has been relegated to the shades, where it belonged.

In *Muncy* v. *Updike,* decided at Staunton, Sept. 11th, 1916, the court reiterates its rule that an instruction must not assume facts which it is for the jury to find, and should not be given unless there is evidence upon which to base it, and in the case of *Sutherland, etc.* v. *Wamlper,* decided the same day, the court calls attention to the fact that time and time again it has condemned the practice of multiplying unnecessary instructions, the only effect of which is hopelessly to perplex the jury and to introduce error into the record. "It is the settled rule of this court," said Judge Whittle in this last named case, "not to reverse a judgment for the refusal of the trial court to give other instructions when it appears that the jury already have been correctly and fully instructed."

In view of the numerous decisions and expressions of our Supreme Court is it not the duty of all high-minded practitioners anxious to curb chicanery and to advance the orderly administration of justice in the court, to see to it that there should be no unnecessary multiplication of instructions—no attempts to mislead juries or embarrass the court, but to strive to have the law plainly and intelligently stated to the jury. In no less than six cases in one volume of the Virginia Reports—Vol. 117—has our Supreme Court dealt with this vexatous question in no uncertain terms. Cannot the bar of the State strive to hold up the hands of the court.

Validity of a Stipulation for an Attorney's Fee in a Negotiable Note.

This question, which has been the subject of much dicussion amongst the profession in this state, has at last been put at rest by the decision of our Supreme Court in Colley *v.* Summers, etc., Co., decided September 11th, 1916. The Court holds that such a stipulation is valid if the amount fixed is not in itself unreasonable or unconscionable. The amount provided for in the note in question was ten per cent. The court adds a note to its opinion, calling attention to the article of our former associate Editor T. B. Benson in VIRGINIA LAW REGISTER, Vol. 2, N. S., p. 1, which the court says is interesting and instructive. We report this case in full in this number.

Is the Practice of Christian Science "Medical Practice" and Does the Virginia Act Clearly Prohibit It?

The Court of Appeals of the state of New York within the present six months has decided that the practice of Christian Science is not a medical practice. One Willis Vernon Cole was convicted of illegally practicing medicine in 1912. His method of treatment, for which a fee was charged, consisted simply of holding his patient's hands and reading from Mrs. Eddy's book "Science and Health." For these services he charged a fee. The case was taken to the New York Appellate Division, where the following question was asked: "Is the commercial use of prayer for the purpose of treating all persons seeking cure for all kinds of bodily ills the practice of the religious tenets of the church?" It appears that the New York statute specifically exempts from its terms those who in the treatment of bodily ills follow out the tenets of any religion, and by answering the question of the Appellate Division in the affirmative the court simply applies the New York law to the case.

> "Practicing medicine when unaccompanied by acts that are in themselves evil, vicious, or criminal," says Judge Chase in his opinion," is not a crime at common law. Practicing medicine is not malum in se. It is important in the interests of public health and public welfare that a person holding him-

self out as a physician or healer of diseases should have the education, training, skill, and knowledge adequate for such purposes. Statutes designed to protect public health and the general welfare by regulating the practice of medicine have been enacted from time to time in some part of all the territory constituting this State since 1760.

"A person should not be allowed to assume to practice the tenets of the Christian Science or any church as a shield to cover a business undertaking. When a person claims to be practicing the religious tenets of any church, particularly where compensation is taken therefor and the practice is apart from the church edifice or the sanctity of the church edifice or the sanctity of the home of the applicant, the question whether such person is within the exception should be left to a jury as a question of fact.

"In this case the court charged the jury: 'If you find from the evidence in this case that this defendant did engage in the practice of medicine as alleged in the indictment, within the definition which I have given you, it is no defense that he did what he did from any sense of duty, or that he did these acts in the practice of a religious tenet of the Christian Science Church.'

"We are of the opinion that the court was in error in so charging the jury."

This case caused us to look into § 1750 of the Virginia Code, which was enacted to apply to "healers" practicing Christian Science as medical treatment. The act as it stood in the Code was perfectly clear and read as follows: "No person who shall have commenced the practice of medicine or surgery in this state since the 1st day of January, 1885, or who shall hereafter commence the practice of the same, shall practice as a physician or surgeon for compensation without having first obtained a certificate from the State Board of Medical Examiners and caused the same to be recorded as aforesaid, or a special permit from the President of said Board. To open an office for such purpose or to announce to the public in any way a readiness to practice medicine in any county or city of the state, or prescribe for or give surgical assistance to, or to heal, cure or relieve those suffering from injury or deformity or disease of mind or body, or to advertise or to announce to the public in any manner a readiness or ability to heal, cure or relieve those who may be suffering from injury or deformity, or disease of mind or body, *shall be* to engage

in the practice of medicine within the meaning of this section * * *" "It shall also be regarded as practicing medicine within the meaning of this section if any one should use in connection with his or her name the words or letters 'Dr.', 'Professor', 'M. D.', or 'Healer' or any other title, word, letter or designation intending to imply or designate him or her as a practitioner of medicine or surgery in any of its branches."

This act was amended by the Acts of 1910, page 272, and § 1750 was changed so that the words "shall be to engage in the practice of medicine" were left out and the following language used, "To open an office for such purposes, etc., etc., etc., or to advertise or to announce to the public in any manner a readiness or ability to heal, cure or relieve those who may be suffering from injury or deformity, or disease of mind or body, shall he or she engage in the practice of medicine within the meaning of this section."

Of course it is perfectly apparent that the words "shall he or she engage" were intended to be "shall be to engage." The act as amended in this respect is nonsense, but how are the courts to construe it when one is proceeded against for illegally practicing medicine and defends on the ground that only Christian Science is practiced? Will their definition as amended by the Act of 1910 cover the case in view of the fact that criminal statutes must be strictly construed?

Clerks of Courts—Deputies—Alteration of Writs.

In *Farmers' Bank, etc.*, v. *McGavock, etc.*, decided September 11th, 1910, our Supreme Court renders an exceedingly interesting decision as to the power of a deputy clerk to sign his own name as Deputy, to writs. The lower court held that a writ concluding: "Witness James Rider, Clerk, etc., etc." Signed "Jas. C. Capell, Dep. Clerk," was void. The Supreme Court reverses this decision, holding that § 26, article 6 of the Constitution of Virginia declaring that "writs shall run in the name of the Commonwealth of Virginia and be altered by the clerks of the several courts, has always been accompanied by subsidiary legislation establish-

ing the office of deputy clerk and clothing that statutory officer in effect with all the powers and duties of his principal: And that under § 817 of the Code of 1887 (the statute in force when the writ in question was issued—as it is now) the deputy "may discharge any of the official duties of" his principal not expressly forbidden by law. Section 26 of the Constitution does not expressly forbid the deputy clerk to discharge the duty of altering writs. Therefore his alteration was sufficient. In view of the fact that the writ ran "Witness James Rider, Clerk, etc.," we do not well see how there could have been any question in the case—for certainly that was an alteration by the clerk even without the deputy's signature. It is probable—nay we suppose certain—that in the original writ the name "James Rider, Clerk, etc." was *printed,* but there is nothing in the record to show this. "Witness James Rider, Clerk of said court, etc., etc.," is certainly an attestation, and we do not think it makes much difference how the deputy signed the writ.

But we see with pleasure that the court cites and reviews the decision of Judge Keith in Brown *v.* Eppes, 91 Va. 726, that when the courts have for years exercised jurisdiction under a statute and during all that time there has been no doubt entertained or question raised as to the Constitutionality of that Statute—and all this in the presence of our able and inquisitive bar—a strong presumption is raised that the attack has not been made upon the Constitutionality of the law because in the judgment of the courts and of the profession no such ground of objection existed.

Sound sense and good law and the present decision adds to it this cogent conclusion:

"Yet if the question were doubtful, we would not feel justified in overruling the practical construction generally placed by clerks and their deputies on the Constitution and Statute of the state for generations and impose upon the public the evils that would flow from such ruling."

The Game Law.

The Act of the Virginia Assembly approved March 11th, 1916, and commonly styled the Game Law is a most excellent piece of Legislation and meets with wellnigh universal approval.

Section 33 of the Act has caused some discussion, but we do not think there is any ambiguity about it. That section reads as follows: "If the owner of any premises shall post notices thereon in conspicuous places, stating that hunting thereon without written permission is prohibited, then any person, who hunts on such lands, during that current year without first having obtained from the owner or agent thereof permission in writing to do so, shall be guilty of a misdemeanor, and on conviction shall be fined not less than five nor more than twenty-five dollars: provided that if the owner or agent of such lands shall at the trial request the remittance of the penalty the trial judge shall so order. Provided that this section shall not apply to coon, opossum, beaver, skunk, fox or deer hunters."

Now it must be noted that the notice required by this section requires a good deal more than is usually supposed sufficient. To put up the old form of notice "Posted," or "This Land is Posted," or that "Hunting, Fishing and Ranging on This Land is Prohibited" will not do. The notice must read, "Hunting on This Land without Written Permission Is Prohibited" and evidently should be dated and new notices posted every year—for hunting is only forbidden on such lands "during that current year." We suppose the legislature meant that current year during which the notices are posted. Otherwise the words are meaningless. It will be observed that "fishing" on the land of another is not prohibited nor will the posting of any notice have any effect upon the "lone fisherman;" he remains liable only to the penalties under the common law as a simple trespasser.

The sagacious coon, the deceitful "possum" and the wily fox may be hunted on the lands of another, as may skunks, beavers and deer. Hunting for such animals also remain "as at common law," but it is to be observed that all such hunters must obtain licenses. Some have gone so far as to argue that this section gives an absolute right to fox, coon, possum, beaver, skunk and deer hunters to go upon any ones land, but we do not think this

section can be twisted into any such construction. The misdemeanor consists in "hunting" upon lands which have had the notices required by the statute posted upon them. But the offense of trespassing upon the land of another remains unaltered except as to hunting. It is certainly a question, however, whether the common law trespass has not been entirely done away with as to a hunter having a license, who hunts upon lands on which the notice required by Statute has not been posted. For such hunting is declared to be a misdemeanor only when the statutory notices have been posted and therefore it is not a misdemeanor otherwise.

Section 41, it seems to us, is unfortunate in expressly repealing all "inland fish laws" whether special, general or local, in conflict with the provisions of the Act. But as no law of any kind relating especially to fish is to be found in the Act, we do not see how this clause can do any harm. But was it necessary?

Tax on Interest for Recording Deed of Trust.

Since the writing of the note on "Tax on Interest for Recording Deeds of Trust," we have been reliably informed, that, with but two qualified exceptions, the universal custom of the clerks of courts of the state has been to tax the principal only of the bond or other obligation. A statute should be construed according to the construction placed upon it by officers acting under it and charged with its enforcement. Where a statute is doubtful the court will consider the practical construction put upon it by the officers, and acted upon, and such construction, when not changed by the legislative action or judicial decision, will be regarded as decisive, and the legislature is presumed to be cognizant of the construction that has been placed on the statute, and where this construction has been long continued, and the legislature evinces no dissent, the court will adopt the practical construction placed upon it by the administrative officers. Smith *v.* Bryan, 100 Va. 199. This rule has unusual force in the present case. It is hard to conceive of an instance in which it would have more fitting application and

where there is a greater necessity that the courts should follow it to avoid divesting and interrupting rights and titles.

By way of supplement to what was said in the note, we add the following quotation from the opinion of Carlson *v.* City of Helena (Mont.), 102 Pac. 39, 44: "Much contention is made over the question whether the interest, as well as the principal, of the proposed issue of bonds should be taken into account in determining whether an indebtedness will be created thereby in excess of the 10 per cent. limit authorized by the statute. * * * This contention proceeds upon the theory that, when interest is expressly reserved in the contract, it becomes a part of the debt, and hence, in determining the amount of indebtedness which a city may contract by the issuance of bonds, the interest up to the date of maturity must be added to the principal. It is true that the reservation of interest is as much a part of the contract as the main promise (State Savings Bank *v.* Barrett, 25 Mont. 112, 63 Pac. 1030), yet no authority has been called to our attention which furnishes support for the rule contended for. Interest is merely an incident to the debt, to be paid from time to time or at the date when the principal falls due, in consideration of the forbearance extended to the debtor, and becomes a part of the debt, or a debt at all, only when it has been earned."

T. B. B.